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6 **UNITED STATES DISTRICT COURT**
7 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

8 **COLLECTORS UNIVERSE, INC.,**)
9)

10 **Plaintiff,**)

11 **v.**)

12 **DUANE C. BLAKE,**)
13)

14 **Defendant.**)
15)

16 **DUANE C. BLAKE,**)
17)

18 **Counterclaimant,**)
19)

20 **v.**)
21)

22 **COLLECTORS UNIVERSE, INC.,**)
23 **PROFESSIONAL COIN GRADING**)
24 **SERVICE, EXPOS UNLIMITED**)
25 **LLC, and DHRCC LLC,**)

26 **Counterclaim**)
27 **Defendants.**)
28)

CASE NO. SACV 14-0333 AG (DFMx)

**ORDER GRANTING
COUNTERCLAIM DEFENDANTS
MOTIONS TO DISMISS
(DKT. NOS. 18, 19, 20)**

1 **1. INTRODUCTION**

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3 On August 15, 2014, Counterclaim Defendant Collectors Universe (“CU”) and
4 Counterclaim Defendant Professional Coin Grading Service (“PCGS”) filed a motion to dismiss
5 Duane C. Blake’s (“Blake”) counterclaims for direct infringement and induced infringement, and
6 to stay Blake’s counterclaim for declaratory judgment of patent validity and enforceability (the
7 “CU Motion”). (Dkt. No. 20.) On the same date, Counterclaim Defendants DHRCC LLC
8 (“DHRCC”) and Expos Unlimited LLC (“Expos Unlimited”) each filed separate motions to
9 dismiss the same three counterclaims (the “DHRCC Motion” and the “Expos Unlimited
10 Motion”). (Dkt. Nos. 18, 19.)

11 Counterclaim Defendants are represented by the same counsel, and their motions to
12 dismiss raise largely identical arguments. And where the arguments diverge, the divergence
13 would have been easier to follow had Counterclaim Defendants filed a single consolidated
14 motion.

15 On September 15, 2014, Blake filed a consolidated opposition to the three motions to
16 dismiss (the “Opposition”). (Dkt. No. 26.) On September 22, 2014, CU/PCGS, DHRCC, and
17 Expos Unlimited filed three separate reply briefs (the “CU Reply,” the “DHRCC Reply,” and the
18 “Expos Unlimited Reply”). (Dkt. Nos. 29, 30, 31.)

19 The result is the same for all Counterclaim Defendants. Counts I and II of the
20 counterclaims, for direct and induced infringement, are dismissed with leave to amend. Count
21 III of the counterclaims, for a declaration of validity and enforceability, is dismissed without
22 leave to amend.

2. BACKGROUND

2.1 Procedural Background

Blake is the inventor and owner of U.S. Patent No. 8,661,889 (the “‘889 Patent”). (Dkt. No. 14-1.) The U.S. Patent and Trademark Office issued the ‘889 Patent on March 4, 2014, and on that very day CU filed this case, seeking a declaration that the ‘889 Patent is invalid and that CU does not infringe. (Compl., Dkt. No. 1 at ¶¶ 31-42.) On July 3, 2014, Blake filed counterclaims against CU and added as counterclaim defendants PCGS, DHRCC, and Expos Unlimited. (Am. Answer and Countercls., Dkt. No. 14.) Blake’s naming PCGS as a separate party is puzzling because, by Blake’s own allegation, PCGS “corporately merged with CU on June 30, 2008. So PCGS was at all relevant times the coin division of CU.” (*Id.* at 20.)

The counterclaims are: (1) for direct infringement of the ‘889 Patent, (2) for induced infringement of the ‘889 Patent, and (3) for a declaration of validity and enforceability of the ‘889 Patent. (*Id.* at 29-31.) All three motions to dismiss argue that the counterclaims fail to state plausible claims for relief, and that the counterclaims are barred by claim preclusion and issue preclusion arising from a prior case brought by Blake against CU, PCGS, and another party. (DHRCC Mot., Dkt. 18-1 at 7-10; Expos Unltd. Mot., Dkt. 19-1 at 7-10; CU Mot., Dkt. 20-1 at 5-7.) Evaluating those preclusion arguments requires some background on that prior case (the “Massachusetts Case”).

2.2 The Massachusetts Case

On August 31, 2011, Blake filed a Complaint in the District of Massachusetts against CU, PCGS, and another party. The claims against CU and PCGS were for violations of Lanham Act Section 43(a), conversion, unjust enrichment, civil conspiracy, misappropriation of trade secrets, unfair business practices, and “injunctive relief.” Complaint, *Blake v. Professional Coin Grading Service, et al.*, No. CV 11-11531 (D. Mass. Aug. 31, 2011), , Dkt. No. 1.

On July 25, 2012, the district court dismissed all claims against CU and PCGS other than the claim for injunctive relief. *Blake*, No. CV 11-11531, Dkt. No. 54 (D. Mass. July 25, 2012). Blake requests that the Court take judicial notice of the July 25, 2012 order granting in part that motion to dismiss. (Opp’n, Dkt. No. 26 at 1.) Setting aside whether judicial notice is necessary or proper, the Court will consider what that order states.

The July 25, 2012 Order, which provided only the result, stated that a memorandum opinion would follow. The court issued that opinion on October 16, 2012. *Blake*, No. CV 11-11531, Dkt. No. 125. The court held that “Blake does not allege any facts indicating that the Defendants evaluate the ‘axial ultimate refractory angle of the coin.’” *Id.* at 19. The court also found that “within the numismatic grading systems, the plus (+) symbol has been generally used in the industry since the 1970s for the purpose of distinguishing higher quality coins within the same grade.” *Id.* The court held that “Blake’s Complaint does not allege facts sufficient to make it plausible that he owned proprietary rights in the plus (+) designation. Blake cannot claim ownership of the plus (+) symbol to indicate a higher quality within the same coin grade because it is a symbol in the public domain and commonly used in the coin grading industry.” *Id.* at 19-20.

On November 8, 2012, the district court granted summary judgment in favor of CU and PCGS on the only remaining claim against them, for injunctive relief. *Blake*, No. CV 11-11531, Dkt. No. 150 (D. Mass. November 8, 2012).

2.3 The Disputed Claim Terms

This Order does not reach the merits of claim construction. But an understanding of the claim construction dispute is necessary to resolve the issue preclusion arguments raised by the Counterclaim Defendants.

The parties dispute the constructions of: (1) “eye appeal” and (2) “eye appeal-related information indicators.” (Jt. Claim Constr. and Prehearing Statement, Dkt. No. 16 at 3-4.) As shown by the parties’ proposed constructions in the table below, the primary dispute is whether

the term “eye appeal” requires the determination of at least one “axial ultimate refractory angle” (“AURA”).

Claim Term	Blake’s Proposed Construction	CU’s Proposed Construction
“eye appeal”	The overall appearance and/or aesthetic attractiveness/beauty of a coin with respect to toning, color, balance, freshness, marks/blemishes, strike, luster, planchet condition, and surface preservation on both the obverse, reverse, and sides of a coin, or any angle thereof.	Overall appearance/aesthetic attractiveness. The eye appeal of a coin is assessed by determining one or more axial ultimate refractory angles (AURAs) of a coin.
“eye appeal-related information indicators”	Plain and ordinary meaning and self-enabling of words ‘information’ and ‘indicator’; or if a specific claim construction is required in this context, an “information indicator” is defined: Any color, hue or shade on the section or material or other written, visual or other sensory information that indicates/conveys information about the coin relating to eye appeal.	Symbol conveying a standardized measurement of the overall appearance/aesthetic attractiveness. The eye appeal of a coin is assessed by determining one or more axial ultimate refractory angles (AURAs) of a coin.

(*Id.*)

3. LEGAL STANDARD

3.1 Motion to Dismiss

A motion to dismiss for failure to state a claim generally raises a “purely procedural question not pertaining to patent law,” for which courts apply “the law of the regional circuit.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007). “Federal Rule of Civil Procedure 8(a)(2), ‘generally requires only a plausible “short plain” statement of the plaintiff’s claim,’ showing that the plaintiff is entitled to relief.” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331 (Fed. Cir. 2012) (quoting *Skinner v. Switzer*,

1 131 S.Ct. 1289, 1296 (2011)). A “complaint must plead ‘enough factual matter’ that, when
2 taken as true, ‘state[s] a claim to relief that is plausible on its face.’” *Bill of Lading*, 681 F.3d at
3 1331 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “This plausibility
4 standard is met when ‘the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged.’” *Bill of Lading*,
6 681 F.3d at 1331 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S.
7 at 556)).

8 Form 18 of the Federal Rules of Civil Procedure provides a sample complaint for direct
9 patent infringement, requiring:

- 10 (1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent;
11 (3) a statement that defendant has been infringing the patent ‘by making, selling,
12 and using [the device] embodying the patent’; (4) a statement that the plaintiff has
13 given the defendant notice of its infringement; and (5) a demand for an injunction
14 and damages.

15 *McZeal*, 501 F.3d at 1357. “A proper use of a form contained in the Appendix of Forms
16 effectively immunizes a claimant from attack regarding the sufficiency of the pleading.” *K-Tech*
17 *Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (citing
18 *McZeal*, 501 F.3d at 1334). The Judicial Conference Committee on Rules of Practice and
19 Procedure recently voted to remove the forms from the Federal Rules of Civil Procedure. Report
20 of the Judicial Conference Committee on Rules of Practice and Procedure, Rules Appendix at B-
21 1 (September 2014). But to become effective, the change would need to be approved by the
22 Judicial Conference, the Supreme Court, and Congress. *Id.* For now, Form 18 governs
23 allegations of direct infringement.

24 But Form 18 does not provide the pleading standard for indirect infringement. *Superior*
25 *Indus., LLC v. Thor Global Enters. Ltd.*, 700 F.3d 1287, 1295 (Fed. Cir. 2012) (citing *in re Bill*
26 *of Lading*, 681 F.3d at 1336). “Rather, the pleading requirements set forth in *Bell Atl. Corp v.*
27 *Twombly* and *Ashcroft v. Iqbal* apply to such claims.” *Id.* (citing *in re Bill of Lading*, 681 F.3d at
28 1336) (citations omitted).

3.2 Claim and Issue Preclusion

“Claim preclusion ‘treats a judgment, once rendered, as the full measure of relief to be accorded between the parties on the same claim or cause of action.’” *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988) (quoting *Kaspar Wire Works, Inc. v. Leco Eng’g & Mach. Inc.*, 575 F.2d 530, 535 (5th Cir. 1978)) (internal quotation marks omitted). It “prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Id.* at 322 (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979)). Claim preclusion applies in the Ninth Circuit “where: ‘(1) the same parties, or their privies, were involved in the prior litigation, (2) the prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits.’” *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938 (9th Cir. 2002) (quoting *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971)).

“[I]ssue preclusion prevents relitigation of all ‘issues of fact or law that were actually litigated and necessarily decided’ in a prior proceeding.” *Robi*, 838 F.2d at 322 (quoting *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979)). “The issue must have been ‘actually decided’ after a ‘full and fair opportunity’ for litigation.” *Id.* (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4416, at 138 (1981)).

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1 **4. ANALYSIS**

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3 **4.1 Counterclaims for Direct and Induced Infringement**

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5 *4.1.1 Failure to State a Claim*

6
7 All Counterclaim Defendants argue that the counterclaims fail to state a claim for induced
8 infringement. DHRCC and Expos Unlimited also argue that the counterclaims fail to state a
9 claim against them for direct infringement.

10 The infringement counterclaims are vague and confusing. The direct infringement
11 allegations against CU and PCGS do satisfy Form 18. But the infringement allegations against
12 DHRCC and Expos Unlimited give no adequate statement of how either party infringes the ‘889
13 Patent either directly or indirectly. Blake alleges that Expos Unlimited “is **involved** in the sale
14 and promotion” of the accused product, “is **involved** and benefits from the promotion, making,
15 use and sale” of that product, and that “**most** of the factual allegations and claims regarding CU
16 and PCGS apply with equal force” to Expos Unlimited. (Am. Answer, Dkt. No. 14 at 21
17 (emphasis added).)

18 Similarly, Blake alleges that DHRCC “is **involved** and benefits from the promotion, use
19 and sale” of the accused product, “**most** of the factual allegations and claims regarding CU and
20 PCGS apply with equal force to DHRCC,” and “[a]uthorized coin dealers, **like** DHRC[C],
21 transact in using, promoting and selling” the accused product. (*Id.* at 21, 23 (emphasis added).)
22 The phrase “involved in and benefits from” is unacceptably vague in this context. So is the
23 phrase “most of the factual allegations . . . apply with equal force.”

24 The direct infringement statute is clear. It is an act of direct infringement to make, use,
25 offer to sell, or sell any patented invention. 35 U.S.C. § 271(a). If Blake believes that Expos
26 Unlimited or DHRCC makes, uses, offers to sell, or sells the accused product, the counterclaims
27 should plainly say so.
28

1 The allegations of induced infringement are confusingly directed against all Counterclaim
 2 Defendants, including DHRCC and Expos Unlimited, but only state that CU and PCGS induced
 3 infringement by causing Expos Unlimited to infringe directly. (Am. Answer, Dkt. No. 14 at 30.)
 4 This does not adequately allege inducement against DHRCC and Expos Unlimited because there
 5 is no allegation that either DHRCC or Expos Unlimited induces any other party to infringe the
 6 ‘889 Patent.

7 Therefore, the counterclaims for direct and induced infringement (counts I and II) are
 8 dismissed with leave to amend. Blake’s amended counterclaims shall include separate
 9 infringement allegations against each opposing party, alleging clearly which are accused of
 10 direct infringement, which are accused of induced infringement, who has been induced to
 11 infringe by each alleged inducer, and what the underlying acts of direct infringement are. *See*
 12 *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117 (2014) (“where there has
 13 been no direct infringement, there can be no inducement of infringement”). Any “factual
 14 allegations and claims regarding CU and PCGS [that] apply with equal force” shall be separately
 15 and specifically alleged. For clarity, Blake shall take care to refer to the other parties throughout
 16 the counterclaims as “Counterclaim Defendants” rather than “Defendants.”

17 18 4.1.2 Claim Preclusion

19
20 Counterclaim Defendants argue that the infringement counterclaims are barred by claim
 21 preclusion arising from the Massachusetts Case because “[t]he claims surrounding the
 22 Massachusetts lawsuit concerned alleged infringement of Blake’s provisional patent application,
 23 which evolved into the ‘889 patent, thus constituting the same nucleus of facts.” (DHRCC Mot.,
 24 Dkt. No. 18-1 at 8; Expos Unlimited Mot., Dkt. No. 19-1 at 8; CU Mot., Dkt. No. 20-1 at 6.)
 25 The Massachusetts Case involved claims under the Lanham Act and Massachusetts state law.
 26 *Blake*, No. CV 11-11531, Dkt. No. 1 (D. Mass. Aug. 31, 2011). Blake expressly stated that he
 27 was not including a patent infringement claim because his patent had not yet issued. *Id.* at 3 n.3.
 28 The Massachusetts Case concluded in its entirety with a final judgment against Blake on January

1 14, 2013. *Blake*, No. CV 11-11531, Dkt. No. 189 (D. Mass. Jan. 14, 2013). The ‘889 Patent
2 issued on March 4, 2014. (‘889 Patent, Dkt. No. 14-1.) The Massachusetts Case was therefore
3 completed before the ‘889 Patent issued.

4 It is unclear what the Counterclaim Defendants mean by “claims surrounding” the
5 Massachusetts Case. Regardless, while 35 U.S.C § 154(d) allows a patentee in some
6 circumstances to recover a reasonable royalty for the time between the publication of a patent
7 application and the issuance of a patent, such “provisional rights” are available only after the
8 patent issues. “A patent application cannot be infringed.” *Abbey v. Mercedes Benz of N. Am.,*
9 *Inc.*, 138 F. App’x 304, 307 (Fed. Cir. 2005). Therefore, whatever “claims surrounded” the
10 Massachusetts Case, patent infringement was not one of them. And because the case concluded
11 before the ‘889 Patent issued, a claim of infringement of the ‘889 Patent could not have been
12 asserted at any time during the Massachusetts Case against any of the Counterclaim Defendants.
13 Because identical claims for patent infringement were not and could not have been litigated in
14 the Massachusetts Lawsuit, Blake’s infringement counterclaims are not barred by claim
15 preclusion.

16 17 4.1.3 Issue Preclusion

18
19 Counterclaim Defendants next argue that the infringement counterclaims are barred by
20 issue preclusion.

21 The Massachusetts district court ruled that “[CU and PCGS] do not use the [plus (+)]
22 symbol to grade the ‘axial ultimate refractory angle of the coin.’” *Blake*, No. CV 11-11531, Dkt.
23 No. 125 at 19-20 (D. Mass. Oct. 16, 2012). But this finding does not resolve the present
24 infringement claims. Because “eye appeal” has not yet been construed, it remains to be seen
25 whether Counterclaim Defendants would need to “grade ‘the axial ultimate refractory angle’”
26 (“AURA”) to infringe.

27 And, the Massachusetts district court held for the purpose of evaluating state law claims
28 that CU and PCGS did not use the plus (+) symbol to grade the “AURA” of the coin according

1 to the meaning of “AURA” established by the context of that case. The meaning under
2 principles of patent claim construction might differ. So even if the claims here involve “AURA”
3 grading, it is plausible that the Counterclaim Defendants could be found to “determine one or
4 more AURAs” despite the contrary (at least in name) holding in the Massachusetts Case. In
5 short, the Counterclaim Defendants’ argument on this point is premature.

6 Finally, the relevant ruling in the Massachusetts Case was made on October 16, 2012 and
7 thus applied only to the activities of CU and PCGS before that date. This case also covers the
8 time period following that ruling, a period of over two years during which CU and PCGS may
9 have changed their activity. The ruling in the Massachusetts Case therefore has not been shown
10 to have decided the factual predicates for deciding whether CU and PCGS infringed in the time
11 since October 16, 2012, as neither side has made a showing concerning whether or not CU and
12 PCGS changed their activity since that time.

13 The Massachusetts court did rule that Blake lacked a proprietary interest in using the plus
14 (+) designation to show that a coin was of higher within-grade quality. *Blake*, No. CV 11-
15 11531, Dkt. No. 125 at 19-20 (D. Mass Oct. 16, 2012). But the plus (+) designation is only an
16 element of the asserted patent claims. A patentee’s right to exclude extends only to the claims as
17 a whole, not to the claims’ individual elements by themselves. *Gen. Foods Corp. v.*
18 *Studiengesellschaft Kohle mbH*, 972 F.2d 1272, 1274 (“each claim is an entity which must be
19 considered as a whole. It cannot be said—though it often is, incorrectly, by the uninitiated—that
20 a part of a claim is ‘claimed’ subject matter.”); *see also Leggett & Platt, Inc. v. Hickory Springs*
21 *Mfg. Co.*, 285 F.3d 1353, 1358 (Fed. Cir. 2002) (quoting *Mas-Hamilton Grp. v. LaGard, Inc.*,
22 156 F.3d 1206, 1211 (Fed. Cir. 1998) (“To prove literal infringement, the patentee must show
23 that the accused device contains every limitation in the asserted claims.”)); *Mas-Hamilton*, 156
24 F.3d at 1211 (“If even one limitation is missing or not met as claimed, there is no literal
25 infringement.”). It is therefore possible that Blake may have a patent on his claimed method as a
26 whole without having a proprietary interest in the plus (+) designation by itself.

27 For all those reasons, Counterclaim Defendants have not shown that issue preclusion bars
28 any of Blake’s counterclaims.

4.1.4 Doctrine of Equivalents

Counterclaim Defendants argue preemptively that the infringement counterclaims are not saved from claim preclusion and issue preclusion simply by alleging infringement under the doctrine of equivalents. (DHRCC Mot., Dkt. No. 18-1 at 10-11; Expos Unlimited Mot., Dkt. No. 19-1 at 10-11; CU Mot., Dkt. No. 20-1 at 9-10.) The argument is unclear, but because the Court finds that claim preclusion and issue preclusion do not apply, it is also moot.

4.1.5 Analogies to Claim Preclusion in Title VII and FTCA Cases

In their Reply Briefs, Counterclaim Defendants raise a new argument analogizing this case to those where claim preclusion barred Title VII and FTCA claims. (Pl.'s Reply, Dkt. No. 29 at 6-8; DHRCC Reply, Dkt. No. 30 at 3; Expos Unltd. Reply, Dkt. No. 31 at 3.) Several Ninth Circuit and district court cases have held claims precluded by prior litigation where plaintiffs litigated discrimination or tort cases before completing pre-suit administrative procedures that would have allowed them to also bring FTCA or Title VII claims. (Pl.'s Reply, Dkt. No. 29 at 6-7.) When those plaintiffs later completed the necessary administrative proceedings and tried to bring a second case under Title VII or the FTCA against the same parties, the courts held the claims barred by claim preclusion. (*Id.*) The cases reason that those plaintiffs were asserting new claims based on the same set of facts, and could have requested that the litigation be stayed pending the administrative proceedings or simply waited before bringing their first actions. (*Id.*)

Counterclaim Defendants only raised this argument in their reply briefs. Courts "need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007). Even if the Court were to consider the argument, Counterclaim Defendants cite no authority justifying the application of this theory in a patent case, where "each act of patent infringement gives rise to a separate cause of action." *Hazelquist v. Guchi Moochie Tackle Co.*, 437 F.3d 1178, 1180 (Fed. Cir. 2006).

4.2 Counterclaim for Declaration of Validity and Enforceability

Blake's third counterclaim seeks a declaration that the '889 Patent is valid and enforceable. (Am. Answer, Dkt. 14 at 31.) DHRCC and Expos Unlimited argue that this counterclaim should be dismissed against them because unlike CU, they have not asserted claims for a declaration of invalidity of the '889 Patent and therefore have not created a case or controversy concerning validity or enforceability. (DHRCC Mot., Dkt. 18-1 at 11; Expos Unltd. Mot., Dkt. 19-1 at 11-12.) CU and PCGS argue that the declaratory relief counterclaim should be stayed pending the resolution of a petition for reexamination of the '889 Patent currently before the USPTO. (CU Mot., Dkt. 20-1 at 10.)

The Court need not reach these arguments because the counterclaim fails for other reasons. The Patent Act provides that "a patent shall be presumed valid." 35 U.S.C. § 282(a). "[C]ourts do not declare patents to be valid, and only declare that they have not been proved to be invalid." *Ball Aerosol and Specialty Container, Inc. v. Ltd. Brands, Inc.*, 555 F.3d 984, 994 (Fed. Cir. 2009) (vacating judgment that patent was "valid"); *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1569 (Fed. Cir. 1987) ("It is neither necessary nor appropriate for a court to declare a patent valid."). The accused infringer likewise bears the burden of establishing unenforceability. *Abbott Labs. v. Andrx Pharms., Inc.*, 473 F.3d 1196, 1201 (Fed. Cir. 2007); *see also Hoffman-La Roche, Inc. v. Promega Corp.*, 323 F.3d 1354, 1359 (Fed. Cir. 2003) ("A party seeking to have a patent declared unenforceable has a heavy burden to meet.").

Thus, a counterclaim seeking a declaration of validity and enforceability is not one upon which relief may be granted. Count III is therefore dismissed with prejudice.

1 **5. DISPOSITION**

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3 Counts I and II of the counterclaims, for direct and induced infringement, are dismissed
4 with leave to amend. Count III, for a declaration of validity and enforceability, is dismissed with
5 prejudice. Blake shall file his amended counterclaims no later than October 14, 2014.
6 Responses to that amended pleading shall be filed no later than October 24, 2014.
7

8 IT IS SO ORDERED.

9 DATED: October 6, 2014

A handwritten signature in black ink, appearing to read 'Andrew J. Guilford', is written over a horizontal line.

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12 Andrew J. Guilford
13 United States District Judge
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